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November 26, 1997

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CS Docket No. 95-184 and MM Docket No. 92-260
EX PARTE COMMUNICATION

Dear Mr. Caton:

Today, Andrew Kreig, Nicholas W. Allard and undersigned counsel met with Commissioner Gloria Tristani to discuss the views of The Wireless Cable Association International, Inc. ("WCA") regarding the issues raised in the above-referenced proceeding. The substance of the views expressed on behalf of WCA is reflected in the attached letter to Commissioner Tristani dated November 24, 1997.

Please contact the undersigned should you have any questions regarding this *ex parte* presentation.

Respectfully submitted,

Paul J. Sinderbrand

Counsel to The Wireless Cable Association International, Inc.

cc: Commissioner Gloria Tristani

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Nov. 24, 1997

By Hand Delivery

Commissioner Gloria Tristani
Federal Communications Commission
1919 M St., N.W., Room 826
Washington, D.C. 20554

Dear Commissioner Tristani:

Thank you for agreeing to meet with me and WCA counsel Paul J. Sinderbrand and Nicholas W. Allard on Wednesday to discuss the wireless cable industry. I thought that it might be helpful if before our meeting I provided you with some background on the industry and the issues before the Commission of the greatest importance to us.

In its simplest form, wireless cable utilizes microwave channels in the 2.1 and 2.5 GHz bands allocated to the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") to transmit cable programming networks, local broadcast signals, educational programming, high-speed Internet and other services over-the-air to small antennas mounted on the roofs of subscribers' homes.

The wireless cable industry traces its roots to the early 1970s, when the Commission allocated the 2150-2162 MHz band for the Multipoint Distribution Service ("MDS"). MDS was originally a common carrier service that could be used for the transmission of any type of communications, including occasional video, high speed data, facsimile and other applications. By the late 1970s, however, most MDS stations were being used to deliver HBO or other premium movie channels. At that time, the cable industry had not begun to wire most urban markets, and MDS was the predominant vehicle for delivering pay television in urban areas. However, the wiring of urban America was imminent, so in 1981 the industry requested that the FCC reallocate to MDS additional spectrum in the 2500-2690 MHz band that was allocated to the Instructional Television Fixed Service ("ITFS") and to allow the leasing of excess capacity on ITFS channels. ITFS is an educational service created in the 1960s for the closed-circuit transmission of educational and instructional programming by local educators. Primarily due to the high cost of equipment and programming, the ITFS spectrum was grossly underutilized. The wireless cable saw a partnership with ITFS not only as a way for wireless cable to secure additional channel capacity, but also as a vehicle for providing the educational community with much-need financial support for expanded ITFS offerings and a mechanism for promoting the delivery of educational programming into the home. The Commission agreed and, as a result of a series of rulemakings in the early 1980s, wireless cable soon had full-time access to 13 MDS channels and could lease excess capacity on 20 ITFS channels from the educational licensees of those channels.

The emergence of wireless cable in the 1980s and 1990s was hampered by two circumstances. First, wireless cable found it virtually impossible to secure access to the cable programming services that consumers demand. Cable operators either had acquired equity interests in the major programmers and refused to allow sales to competitors, or were such large customers of the major programmers that they could dictate *de facto* exclusivity. Wall Street stayed away from wireless cable in droves, recognizing that without programming, wireless cable was doomed to failure. It was not until Congress adopted, and

the FCC implemented, the program access provisions of the 1992 Cable Act, that this problem lessened (although serious program access issues still exist) to the point that the wireless cable industry could attract the financial backing necessary to develop systems.

Second, a series of MDS and ITFS application processing delays at the Commission prevented wireless cable operators from securing the critical mass of channels needed to compete. Initially, it had appeared that the 33 full and part-time channels available to wireless cable would be sufficient to compete with cable, but the processing delays made it virtually impossible for operators to secure anywhere near that amount of channels. While some operators (primarily in rural areas) were able to cobble together enough channels to compete, most were forced to stand on the sidelines until the FCC could process their applications.

Compounding the problem, even those that could secure most of the channels found that the marketplace was changing. Taking advantage of the delays faced by wireless cable, cable operators upgraded their plant to permit the delivery of additional services (including more video services, high speed Internet access and even telephony), while the DBS industry made 100+ channel systems available to all. Thirty-three channels was no longer sufficient to satisfy consumer demand. As a result, many wireless cable operators ceased their marketing efforts until the FCC could adopt rules that would permit the use of digital compression on MDS and ITFS channels (which occurred in the summer of 1996) and vendors could perfect digital compression equipment for wireless cable (which is just occurring now). During this period of delay, however, the investment community has battered wireless cable — most of the publicly-held companies are today trading at less than 10% of their highest valuations and 1998 could well see one or more bankruptcy filings.

WCA's primary objective is to promote a regulatory environment that allows wireless cable operators to fully compete in an every-changing marketplace. Although WCA is participating is dozens of proceedings before the Commission, there are three areas of primary concern: 1) Flexible use of MDS and ITFS Spectrum; 2) Program Access; and 3) Inside Wiring. (These concerns are summarized on a two-page attachment to this letter.)

I hope that this summary gives you some preliminary insight into the wireless cable industry and WCA's agenda. I look forward to meeting with you later in the week to expand upon these issues.

Respectfully yours,

Andrew Kreig

Andrew Kreig
WCA President

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Critical Wireless Cable Issues Before the FCC

Flexible Use of MDS and ITFS Spectrum — If wireless cable is to compete, it must have the ability to provide consumers with the same variety of two-way services that the cable industry is offering, such as high-speed Internet access and even telephony. In March 1997, over 110 participants in the wireless cable industry (including WCA, most wireless cable operators and many of the MDS and ITFS licensees from whom they lease channel capacity), proposed detailed changes to the MDS and ITFS rules to permit such offerings. The FCC has released a *Notice of Proposed Rulemaking* in MM Docket No. 97-217 that proposes to adopt some, but not all of the proposed rules. Two elements of the *Notice* are particularly troubling to WCA.

First, the FCC has tentatively rejected a proposal that would allow MDS and ITFS licensees to construct facilities without specific prior FCC authorization. Since many of the service providers that we will compete against will employ LMDS, WCS, GWCS, 39 GHz or other services that enjoy such flexibility, they will have a substantial marketplace advantage if wireless cable cannot rapidly respond to demand for new facilities. The industry has been devastated by application processing delays in the past, and cannot afford to lose any additional time in this very competitive marketplace. Second, the Commission appears to be continuing its paternalistic attitude towards ITFS licensees. For years, the FCC has micromanaged the relationships between ITFS licensees and wireless cable operators, denying local educators the flexibility to craft leasing arrangements that best serve local educational needs. Particularly now that the variety of services available using this spectrum is increasing dramatically, it is the local educator who can best determine how ITFS should be used to serve local educational needs.

Program Access — Although the program access provisions of the 1992 Cable Act and the Commission's Rules have gone a long way towards assuring alternative technologies fair access to programming, there are several significant loopholes that cable is beginning to use to its advantage. In its comments in connection with the FCC's annual assessment of the status of competition in the video marketplace and elsewhere, WCA has brought these issues to the FCC's attention.

First, the rules are only applicable to vertically integrated programmers. In a variety of transactions recently, deals have been structured by the cable industry so that the programmer in issue is not technically vertically integrated, but faces the same pressures to discriminate against wireless cable as if it were vertically integrated. For example, MSNBC refuses to make its programming available to wireless cable. Although MSNBC is not considered to be vertically integrated, Microsoft has substantial equity interests in both it and in cable, subjecting MSNBC to the same pressures as if it were directly owned by a cable operator.

Second, the rules are only applicable to satellite-delivered services. We are already seeing an effort on the part of cable operators to acquire local sports rights and migrate games from satellite-delivered services to those that are delivered terrestrially. WCA believes, and the FCC's OVS order confirms, that the Commission has authority to address cable's efforts to deter competition by migrating programming off of satellites and then refusing to sell to alternative service providers.

Third, the rules do not provide for the recovery of damages against a programmer or cable operator that violates the program access rules. Thus, there is no incentive to comply -- programmers refuse to deal with alternative service providers until the Commission order otherwise, giving the cable industry a head-start in the marketplace. Allowing the recovery of damages is the most effective mechanism the Commission could employ to end this behavior.

Finally, the rules do not provide wireless cable operators and other alternative service providers a right to discovery. Particularly in cases involving discrimination in rates, it is extremely difficult for a newcomer to demonstrate that it is being charged unreasonably higher rates without the benefit of discovery. Allowing limited discovery as of right will alleviate this problem.

Inside Wiring— One of the greatest impediments to competition in apartments, condominiums, cooperatives and other multiple dwelling units ("MDUs") is the reluctance of the owner to have its building damaged by the installation or removal of wiring used to provide cable service once such wiring is installed for the first time. As a result, an owner is frequently unwilling to allow a competitive service provider like wireless cable access to its building if the building will have to be re-wired. The FCC's recent rule changes to little to alleviate this problem, because they allow the cable operator to elect to remove its wiring upon a change in service provider. The very fact that a cable operator can opt to remove its wiring is likely to deter owners from considering a change in service provider. Moreover, the new rules allow the cable operator to force a sale of the wiring to the building owner through a binding arbitration proceeding, without providing any guidance as to how the price for the wiring is to be set. This uncertainty will further deter building owners from even starting a process that could result in them being forced to buy wiring at an unknown price.

A second substantial impediment to competition in MDUs is long-term exclusive contracts entered into between owners and cable operators that were effectively contracts of adhesion — since cable at the time was the only multichannel video service widely available, owners often had little choice but to agree. While exclusive contracts have their place, they are inherently suspect when they result from monopoly power. Thus, WCA has proposed that owners have an opportunity to take a "fresh look" at long-term agreements with monopoly cable providers and to reject those agreements until such time as effective competition is present.